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88-133

Supreme Court, U.S.
FILED
JUL 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

CW2 (Ret.) NEIL F. McCARRON, JR.,

PETITIONER

V.

THE UNITED STATES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is an Army warrant officer who has served for more than 16 years as a commissioned officer entitled to be retired after 20 years service as a commissioned officer under the provisions of 10 USC 1293, 1371, 3911, and 3926?

2. Is an Army warrant officer prevented by the provision of 10 USC 3964 from being retired as a commissioned officer?

3. Was the petitioner denied his constitutional right to due process and equal protection of the law in a case of statutory construction, when the court based its construction of the applicable statutes solely upon the language used in the U.S. Code, and expressly refused to examine the statute and its legislative history to ensure that the court's construction conformed to

the purpose and object of the statute?

4. Was the petitioner denied his constitutional right to due process and equal protection when the trial court, in a case of statutory construction:

(a) construed 10 USC 3964 to compel an unequal and discriminatory application of the statute between the two groups to which it applies, retired warrant officers and enlisted men of the Army; by preventing warrant officers but permitting enlisted men to be retired in higher commissioned officer grades?

(b) construed 10 USC 1371 to compel an unequal and discriminatory application of that statute between the persons to which it applies, the warrant officers of the Army and Navy by preventing Army Warrant Officers, but permitting Navy warrant officers to be retired in higher commissioned officer grades?

(c) construed 10 USC 3911 to compel an unequal and discriminatory application of that statute between similarly situated personnel, the enlisted men and warrant officers of the Army by preventing warrant officers, but permitting enlisted men to be retired in a higher commissioned officer grade?

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In the
Supreme Court of the United States
October Term 1988
No. ____

CW2 (Ret) Neil F. McCarron,
Petitioner

V.

The United States,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The petitioner CW2 (Ret) Neil F. McCarron, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Federal Circuit in the above case.

Opinion Below

The U.S. Court of Appeals for the Federal Circuit entered the decision on 28 March 1988, a copy of which is attached at Appendix 32. A petition for rehearing was denied by the Court of 25 April 1988, a copy of which is attached at Appendix 36.

In its opinion, the Court of Appeals affirmed a decision of the U.S. Claims Court which denied petitioners motion for Summary Judgment and granted the defendants Cross Motion for Summary Judgment.

The U.S. Claims Court opinion, filed on 2 July 1987 and entered on 6 July 1987 appears at 12 Cl. Ct. 582 (1987), a copy of which is attached at Appendix 37.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 USC 1254, the jurisdiction of the U.S. Claims Court was invoked under the provisions of 10 USC 1491, 10 USC 1371, 10 USC 3911, 10 USC 277, and the Fifth Amendment to the Constitution.

Constitutional Provisions, Statutes

Fifth Amendment to the Constitution

> No person shall...be deprived of life, liberty, or property, without due process of law...

U.S. Code Provisions

10 USC 277
10 USC 1293
10 USC 1371
10 USC 3911
10 USC 3918

10 USC 3926
10 USC 3964
10 USC 6323
10 USC 6325

Statutes

The Army and Air Force Vitalization and Retirement Equalization Act 62 Stat 1084 (1948)

The Warrant Officer Act 68 Stat 157 (1954)

Navy, Marine Corps, and Coast Guard Retirement of Personnel 60 Stat 26 (1946)

STATEMENT OF THE CASE

This petition involves a dispute over the military grade and pay to which the plaintiff was entitled upon his retirement from the Army.

Plaintiff/Petitioner[1] is a former Army officer who was retired in the grade of Chief Warrant Officer (CW-2) after serving on active duty for more than twenty years.

During the course of his military career the plaintiff had served for 16 years, 6 months, and 6 days in higher commissioned officer grades than the grade (CW-2) in which he was retired, and had served for more than 8 years in the grade of Major. Petitioner's last 3 1/2 years of service immediately preceeding his retirement were served in the grade of warrant officer (CW2). Petitioner

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[1]Pro Se Plaintiff/Petitioner in this case is an attorney licensed and practicing law in the State of Massachusetts.

contends he was entitled to be retired as a commissioned officer, in the grade of Major, under the provisions of 10 USC 1293, 10 USC 1371, 10 USC 3911, and 10 USC 3926 because of his prior service for more than 10 years as a commissioned officer.

The facts are undisputed that plaintiff entered the Army as a 2nd Lt. in 1960 and received regular promotions up to and including promotion to Major in 1967. In 1975 and 1976 after 16 1/2 years of service as a commissioned officer and while serving in the grade of Major, plaintiff was considered but not selected for promotion to Lieutenant Colonel. Two promotion passovers such as plaintiff received requires a Reserve Officer to be released from Active Duty pursuant to 10 USC 3303 (1976). Plaintiff however, in order to remain on active duty, applied for and was given an appointment, on active duty, in the Army, as a warrant

officer. On 5 August 1976, plaintiff resigned his reserve commission as a major, and on the following day accepted an appointment as a warrant officer, on active duty in the Army. Plaintiff's last 3 1/2 years of service in the Army were served in the grade of Chief Warrant Officer (CW-2).

In 1979 prior to his retirement, plaintiff asked the Army for a determination of his eligibility to be retired under the provisions of 10 USC 3911 in the higher commissioned officer grade of Major. Plaintiff noted in his request that similarly situated personnel, Army enlisted men and Warrant Officers of the Naval services, are retired in higher commissioned officer grades under the provisions of law for retirement of commissioned officers of the respective services.

The Army replied that plaintiff was not entitled to be retired in any grade other

than Warrant Officer. In March 1981, plaintiff applied to the Army Board for Correction of Military Records (ABCMR) seeking correction of his records to reflect retirement in the grade of Major, with retirement pay for that grade retroactive to the date of his retirement in April 1980.

The ABCMR denied the petition. This suit was filed in the U.S. Claims Court on 14 September 1981 and decided on 2 July 1987 on cross motions for summary judgement. The Claims Court dismissed the plaintiff's complaint and decided in favor of the defendant.

The case was appealed to the U.S. Court of Appeals for the Federal Circuit which affirmed the decision of the U.S. Claims Court on 28 March 1988. A petition for rehearing was denied on 25 April 1988.

REASON FOR GRANTING THE WRIT

In construing the provision of 10 USC 3911, 3964, and 1371, the court below fashioned a construction based solely on the language of the code and expressly refused to examine the applicable statutes, their purpose, and the relevant legislative history to insure that the court's interpretation was consistent with the purpose and object of the statute.

The Supreme Court has held that a court has a duty in a case of statutory construction, to examine the statute and its legislative history to insure that the search for meaning should not be limited to just the statutory language. Association of Salaried Employees v. Western Electric 348 U.S. 437 (1955). And to prevent a judicial construction of a statute that conforms to the letter of the statute but is not within

the spirit or intent of the legislature Holy Trinity v. United States 148 US 457 (1892).

The two statutes involved, the Army and Air Force Vitalization and Retirement Equalization Act, and the Warrant Officer Act were enacted specifically to equalize retirement benefits between the different armed services and between the warrant officers of the different services in particular.

The court's construction that the provisions of 10 USC 3964 prevent an Army warrant officer from being retired as a commissioned officer defeat the congressional purpose of both of the above statutes by treating Army warrant officers differently and less favorably than the warrant officers of the naval services and differently and less favorably than similarly situated Army enlisted men who are retired as commissioned officers if they have served for 10 or more

years as such.

The language of the code provision upon which the Court based its decision (10 USC 3964) is not so clear and unambiguous that it is susceptible of just one construction.

The court's construction that 10 USC 3964 establishes the criteria for a warrant officer to be retired as a commissioned officer conflicts with three prior decisions of the U.S. Claims Court that identified a distinction between retirement in a higher grade and advancement on the retired list. One of these, Jackway v. The United States 178 F. Supp. 307 was decided in 1959, well after the incorporation of 10 USC 3964 into the code. There the Court of Claims held that a warrant officer who had formerly served as a commissioned officer could be retired as a commissioned officer in the grade of colonel, notwithstanding the existence of the advancement provisions for

warrant officers, or the fact that the individual's last six years of service were served as a warrant officer.

The court's failure to examine the relevant legislative history to insure that its interpretation was consistent with the purpose and objective of the legislation violated petitioners right to due process and equal protection of law, and resulted in an erroneous construction of the code provision. Had the court made a sufficient inquiry, it would have seen that 10 USC 3964 addresses only advancement on the retired list and that 10 USC 1371 establishes the grade in which a warrant officer retires on the date of his retirement.

In construing the provisions of 10 USC 3964, 3911, and 1371 the court fashioned a construction which in each instance compels the unequal and discriminatory application of each of the above statutes as they are

applied to Army Warrant Officers and violates the rule of this court that statutes apply in a uniform manner and nothing but clear and unmistakable language will warrant the unequal operation of a statute Smith v. Townsend 148 U.S. 490 (1892).

ARGUMENT

Plaintiff raised the issue in this case of his right to be retired as a commissioned officer under the provisions of 10 USC 3911 upon completion of twenty years service. The Plaintiff went to great lengths to identify and explain the entitlement but the question was simply not given a reasonable examination by either the trial or appellate court.

Error in Construction of 10 USC 3964

. Ambiguity

Contrary to the rule expressed in Association of Salaried Employees v. Western Electric Supra; neither court examined the statute[2] or legislative history to determine

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[2]The applicable statutes, Army and Air Force Vitalization and Retirement Equalization Act, 62 Stat. 1084, Section 202-205, and the Warrant Officer Act, 68 Stat. 157, Sections 14D, F, were incorporated into Title 10 and codified in 1956. As so codified they were enacted into positive law

if the search for meaning should include those materials. See Opinion, U.S. Claims Court, Appendix 47, U.S. Court of Appeals, Appendix 35. As a result, the U.S. Claims court, relying solely upon the words contained in the code determined that 10 USC 3964 was dispositive of the issue and that its provisions prevent a warrant officer from being retired in any higher grade until he completes thirty years of service.

Because the Court refused to examine the statute and legislative history, it failed to identify a latent ambiguity in 10 USC 3964. The court erroneously concluded that the langugage of 10 USC 3964 which provides for advancement on the retired list rather than rank at retirement, as also requiring thirty years of service to be retired in a higher

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in the Act of 10 August 1956, 70A Stat. 32 of the code. The enactment of the codification was intended merely to restate the law and not alter it. See section 49A of the Act of August 10, 1956, 70A Stat. at 640.

commissioned officer grade.

The two benefits, advancement on the retired list and retirement in a higher grade, are not the same as the Claims Court itself pointed out in the cases of Jackway v. The United States 178 F. Supp. 307, 309 (1959), Jones v. The United States 282 F2d 906, 911 (1960), and Taylor v. The United States 163 F. Supp. 652, 656 (1958).

In Taylor v. The United States Id, the Claims Court first identified and addressed the difference between being placed on the retired list in a higher commissioned grade and being advanced to a higher grade. The Taylor court ruled that an enlisted man who had formerly served for five years as a commissioned officer, would not be retired as a commissioned officer, but would be advanced on the retired list after thirty years of service. See Taylor Id 163 F. Supp. 652, 656 (1958).

But, in Jackway, Supra. which also litigated the distinction between entitlement to retirement in a higher grade and being advanced to it, the Jackway court ruled that a warrant officer who had formerly served as a commissioned officer, was entitled to be retired as a commisssioned officer, in the grade of Colonel, notwithstanding the existence of "advancement" provisions for warrant officers in 10 USC 3964; or the fact that his last six years of active duty were served as a Warrant Officer. See Jackway 178 F. Supp. 307, 311 (1959).

And, in Jones v. The United States, Supra. the Claims Court cited Jackway and reiterated the distinction between retirement in a higher commissioned grade and being advanced to it. See Jones Supra., 282 F2d 906, 911 (1960).

The above cases establish that reitrement in a higher grade and advancement

on the retired list are separate and distinct entitlements, and that the existence of advancement provisions do not prevent a warrant officer from being retired as a commissioned officer.

Unequal Operation

10 USC 3964 applies to both warrant officers and enlisted men; and the defendant had admitted in discovery that this provision does not prevent an enlisted man with 10 or more years of service as a commissioned officer from being retired in a higher commissioned grade. See defendants admission No. 23 Appendix 113. The Courts construction that 10 USC 3964 will prevent the warrant officer but not the enlisted man from being retired in a higher commissioned officer grade violates the principle contained in Smith v. Townsend 148 US 720 (1893) that nothing but clear and unmistakable language will warrant a construction calling for the

unequal operation of a statute.

Unreasonable Result

The Supreme Court has held that a construction of a statute that produces an unreasonable result plainly at variance with the policy of the legislation as a whole must be rejected. Ozawa v. U.S. 260 US 178 (1922), U.S. v. American Trucking 310 US 534 (1946).

The policy of the legislature in enacting the Army and Air Force Vitalization and Retirement Equalization Act, in which 10 USC 3964 was enacted, was to provide Army and Air Force personnel with exactly the same retirement benefits that corresponding personnel of the Navy were given.

The title of act identifies it as a Retirement Equalization Act and its purpose reported in the Senate Report No. 1543 1 June 1948 is to place personnel of the Army and Air Force on a par with personnel of the Navy

for retirement. The Act's sponsor, General Paul, testified in Subcommittee hearing on H.R. 2744 12 May 1947 that the bill was intended to provide "without admendment or modification, Army and Air Force personnel with exactly the same retirement benefits that corresponding personnel of the Navy were provided in Public Law 79-305."

The Court's construction of 10 USC 3964 would destroy that equality which was evidently the intent of Congress by denying to Army Warrant Officers a benefit enjoyed by corresponding warrant officers of the Naval services. It is established in the code and the defendant has admitted that Naval services warrant officers who have served for more than 10 years as commissioned officers are retired in higher commissioned officer grades. See defendants admission, No. 2(a); appendix 111. See also 10 USC 6323, 6325 Appendix 90, 93.

COURTS CONSTRUCTION OF 10 USC 3964 VIOLATES EXPRESS CONGRESSIONAL LIMITATION ON JUDICIAL CONSTRUCTION.

The advancement provisions of 10 USC 3964 were enacted in section 203(C) and 203(E) of the Army and Air Force Vitalization and Retirement Equalization Act of 1948: Appendix 102, 104. Section 205(b) of the act expressly prohibited the advancement provisions from being construed to deny a person of any higher retired grade or pay to which he may be entitled under any other provision.

> Section 205(b) of the Act provides: Nothing contained in this title shall be construed to deprive any person of any higher retired grade or rank, or any greater retired or retirement pay to which he or she may be entitled under any other provision of law.

The Court's determination that the advancement provisions in 10 USC 3964 would prevent a warrant officer on active duty from

being retired in a higher grade violates the express prohibition of such a construction at section 205(B) of the Act.

Error in Construction of 10 USC 1371

In arriving at its decision, the appellate court concluded that 10 USC 1371 limited an Army warrant officer to retirement only in the grade he held on the day of retirement, See Opinion, U.S. Court of Appeals, Appendix 34. That construction defeats the very purpose of the Warrant Officer Act from which 10 USC 1371 is derived, and it compels the unequal operation of the statute between Army[3] and Navy warrant officers.

The purpose of the Warrant Officer Act is found in Senate Report 1284 on HR 6374 dated 14 April 1954. Under the heading MAIN

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[3]The Air Force discontinued and no longer has a warrant officer program.

CONCEPTS of the bill is found:

"The bill in providing for a permanent statutory career plan for warrant officers establishes:

(c) Uniform retirement rights for warrant officers of all the military services who complete 20 years of active service."

Here, the statute clearly applies to warrant officers of all of the services, not just Army warrant officers, and it is established that warrant officers of the Navy are not prevented by 10 USC 1371 from being retired in higher commissioned officer grades than those they hold upon the day of retirement.

The court's construction that 10 USC 1371 prevents an Army warrant officer, but not a Navy warrant officer, from being retired in a higher commissioned officer grade produces an unreasonable result, plainly at variance with the intent and

purpose of the legislation.

The construction also violates the principle expressed in the Supreme Court case of Smith v. Townsend 148 US 490 (1892) that nothing but clear and unmistakable language will permit the construction of a statute which results in its unequal operation.

The congressional intent that a warrant officer's opportunity to be retired in a higher grade be preserved for him is expressed in the proviso to 10 USC 1371, "Unless entitled to a higher grade... a warrant officer retires in the grade he holds on the day before he retires...." Appendix 83. Congress was specifically assured by the military in testimony before the House Subcommittee on H.R. 6374 on 3 March 1954, Appendix 109, that a warrant officer's right to retire as a commissioned officer under the law for retirement of commissioned officers, was preserved to him by the savings provision

of section 14(f) of the Act. These provisions now codified as the proviso to 10 USC 1371 provided:

> The provisions of this section or section 13 shall not prevent any warrant officer from electing to be placed on the retired list in the highest grade and with the highest pay to which he may be entitled under any other law.

Appointment Form

In the Warrant Officer Act Congress allowed one difference to remain in the form used to appoint warrant officers to their office. Navy warrant officers would be appointed by "commission" and Army warrant officers would be appointed by "warrant". In permiting this difference to remain in existence, Congress was specifically assured by the services that the difference in appointments was a matter of form only, and that no inequities would result.[4] See Senate

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[4]In 1986, five years after this suit was begun, the Army sponsored legislation that changed the appointment form of Army warrant officers from a "warrant" to a "commission"

Report No. 1284 on H.R. 6374, 14 April 1954, p, 919, Appendix 107.

The court's conclusion that congress intended a different "statutory scheme" or even different retirement provisions for Army warrant officers based on their appointment form is directly contradicted by the above legislative history and by a previous admission of the defendant. See defendant's admission No. 11, Appendix 112.

Error in Construction of 10 USC 3911

The Court's construction that 10 USC 3911 excludes warrant officers from its provisions, conflicts with the purpose and object of the statute from which 10 USC 3911 was codified.

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and in that manner terminated their former illegal practice of denying Army warrant officers the right to be retired under the provisions of 10 USC 3911 as commissioned officers. See 10 USC 555(b) Appendix 96.

The Acts title, its purpose and its sponsor, General Paul clearly expressed the legislative intent that the statute was to provide Army and Air Force personnel with exactly the same retirement benefits that corresponding personnel of the Navy were given in Public Law 79-305.

Provision for Retirment of Navy Officers

The provision for retirement of navy officers in Public Law 79-305 states "... Any officer... or any member of the naval service... with twenty years federal service... 10 of which is commissioned... may be retired." Appendix 99.

The provision for retirement of commissioned officers of the Navy apply to all naval personnel; commissioned officers, warrant officers, and enlisted men. See 10 USC 6325, 6326. And the legislative history shows the provisions were drafted

specifically to include and apply to warrant officers and enlisted men who could qualify. Capt. Hopwood testified in Senate Hearing on S. Bill 1405, 1 November 1945, that "

> An officer under existing law must have 20 years commissioned service to retire. This changes the 20 years to 10 years of commissioned service, and 10 years of maybe enlisted service. We have very many warrant officers and commissioned warrant officers who would not be eligible except under those conditions.

The Army adopted practically identical language for its officers in section 202 of the Equalization Act. "Any officer... with twenty years federal service... 10 of which is commissioned... may be retired..." Appendix 101. And like the Navy, these provisions were made applicable to warrant officers by the provision of 203(c) of the Act which states, "Warrant officers shall be entitled to retirement under the same conditions as commissioned officers..." Appendix 102. Defendant has admitted that the Army has previously retired Army warrant

officers and enlisted men as commissioned officers under the provisions of section 202 of the Equalization Act. See Defendant's Admission No. 28, Appendix 111. And, continues to retire Army enlisted men under that provision. See Defendant's admission No. 23, Appendix 113.

And the Comptroller General in a response to an Army inquiry regarding section 202, held in 1949 that section 202,

> ...applies to any officer of the Reserves... and that the benefit granted is in recognition of the fact that the officer served on active duty for 20 years at least 10 of which must have been commissioned service... and that is the only requirement he must meet...

See, 28 Comp. Gen. 655, 661 (1949).

However, in its opinion the U.S. Claims Court concluded that section 202 "was changed and limited to commissioned officers during the 1956 codification of section 202 into 10 USC 3911". See Opinion, Appendix 50.

The construction that 10 USC 3911

excludes Army warrant officers from its provisions defeats the purpose of both the Retirement Equalization Act and the Warrant Officer Act by treating Army warrant officers differently than Navy warrant officers.

It is also incorrect as a matter of law. Section 49(a) of the Act of August 10, 1956, 70 A Stat. at 640, which codified 10 USC 3911 states: "In section 1-48 of this Act, it is the legislative purpose to restate without substantive change, the law replaced by those sections on the effective date of this Act."

And, the position taken by the appellate court that 10 USC 3911 applies only to commissioned officers, ignores the legislative history and relies totally on the word "commissioned" officer added by the codifier without explanation into 10 USC 3911 in the 1956 codification. Although it went unexplained in 10 USC 3911, the codification of 10 USC 3918, for the retirement of

commissioned officers after 30 years of services, does explain the addition of the word "commissioned" officers to that section. It was added there to distinguish it from the new and separate provisions for warrant officers enacted in the Warrant Officer Act of 1954, and appearing for the first time in the 1956 edition of the U.S. Code as title 10 sections 1293 and 1371. See 10 USC 3918, appendix 86.

The Court's failure to look beyond the language of the code produced the erroneous construction that warrant officers are excluded from being retired under the provisions of 10 USC 3911.

The Court's failure to look to the legislative history to ensure that its interpretation of 10 USC 3911 was consistent with the purpose and object of the legislation deprived the petitioner of his rights to the due process and equal

protection of the law.

Conclusion

For the foregoing reasons, Petitioner Neil F. McCarron, Jr. respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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Dated: 19 July 1988

APPENDIX

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

87-1548

CW2 (RET.) NEIL F. MCCARRON, JR.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: March 28, 1988

Before MARKEY, Chief Judge, NICHOLS, Senior Circuit Judge, and NIES, Circuit Judge.

DECISION

CW2 (Ret.) Neil F. McCarron, Jr. (McCarron) appeals the U.S. Claims Court's grant of summary judgment to the United States that McCarron is not entitled to an upgrade of his Army retirement pension rate to reflect his one-time service in the commissioned grade of major. 12 Cl. Ct. 582 (1987). We affirm.

The Claims Court properly looked first to the language of the applicable statute, 10 U.S.C. Section 3964 (1976). United States v. Turkette, 452 U.S. 576, 580 (1981). As the Claims Court held, the language of that section does not entitle McCarron to the relief he seeks, 12 Cl. Ct. at 584, and McCarron has shown no clearly expressed legislative intent to the contrary. See id.; Texas State Comm'n for the Blind v. United States, 796 F.2d 400, 406 (Fed. Cir. 1986) (in

banc), cert. denied, 107 S. Ct. 874 (1987). Reading Section 3964 together with 10 U.S.C. Sections 1371 and 3911, as McCarron urges, does not alter that conclusion. McCarron was retired in the warrant officer grade he held on the day before he retired, as Section 1371 requires. Section 3911 is inapplicable, for on its face it relates only to retirement of commissioned Army officers.

McCarron's reliance on legislative history of repealed statutes is unpersuasive. As the Claims Court noted, the Army and Air Force Vitalization and Retirement Equalization Act "does not override later provisions enacted by Congress to provide solely for retirement of warrant officers in the Army," 12 Cl. Ct. at 585. Moreover, assuming that Act and the Warrant Officer Act apply here, McCarron has pointed to nothing in their language or legislative history requiring

the Army to adopt the Navy's practice of retiring its warrant officers in the highest commissioned rank held.

Congress has the authority to enact different rules for the different branches of the military services. See generally Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft registration); Alexander v. Fioto, 430 U.S. 634 (1977) (upholding statute excluding reservists who did not return to active duty during World War II from receiving retirement benefits); U.S. Const. art. I, Section 8, cls. 12-14.

McCarron has shown no error in the Claims Court's opinion. We affirm on the basis of that opinion.

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals for the Federal Circuit

87-1548

CW2 (RET.) NEIL F. McCARRON, JR.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Before MARKEY, Chief Judge, NICHOLS, Senior Circuit Judge, and NIES, Circuit Judge.

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT:

Francis X. Gindhart

Francis X. Gindhart, Clerk

4/25/88

Date

cc: Mr. Neil F. McCarron, Jr.
Mr. John S. Groat, DOJ

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

APR 25 1988

FRANCIS X. GINDHART
CLERK

IN THE UNITED STATES CLAIMS COURT

No. 561-81C

(Filed July 2, 1987)

CW2 (Ret.) NEIL F. McCARRON, JR.,	)	
Plaintiff,	)	Military Pay; Warrant Officer Retirement; Statutory Construction; Fifth Amendment
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

Neil F. McCarron, Jr., pro se, Bedford, Massachusetts.

John S. Groat, Washington, D.C., with whom were Assistant Attorney General Richard K. Willard, David M. Cohen, and Thomas W. Petersen, for defendant.

OPINION

HORN, Judge.

This military pay case came before this Court on September 14, 1981, 1/ and is now before the Court on plaintiff's motion for summary judgement and defendant's cross-motion for summary judgment.

Plaintiff, Neil F. McCarron, Jr., a former United States Army officer, brought this action under Section 202 of the Army and Air Force Vitalization and Equalization Act of 1948, c. 708, 62 Stat. 1081, 10 U.S.C. Section 971(b), repealed

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1/ This case was transferred to Judge Horn after the retirement of Judge Wood in 1986. Plaintiff filed a Motion for Leave to File Supplemental Authority on May 12, 1987. Plaintiff's motion was allowed on May 12, 1987, and plaintiff's submission was entered into the record on that date.

by 70A Stat. 641 (1956), reenacted and codified as 10 U.S.C. Section 1331, Act of August 10, 1956, c. 1041, 70A Stat. 1, 102; Sections 14(d) & (f) of the Warrant Officer Act of 1954, c. 249, 68 Stat. 157, repealed by 70A Stat. 641, reenacted and codified as 10 U.S.C. Section 1371 (1976); 10 U.S.C. Section 277 (1976), and the Fifth Amendment to the Constitution. Plaintiff seeks retirement in the higher grade of major, effective back to April 1, 1980.

At the time of his final retirement from the military in 1980, McCarron petitioned the Army Board for the Correction of Military Records (ABCMR), for an upgrade of his retirement pension rate from that of a noncommissioned chief warrant officer two, to reflect the highest temporary commissioned grade, that of major, in which he had satisfactorily served at any time during his military

career. Although plaintiff had completed the required 20 years of service to retire, the ABCMR found that the plaintiff was not eligible for a retirement upgrade. Plaintiff then sought a review of the ABCMR decision in this Court and has now moved for summary judgment.

Defendant contends in its cross motion for summary judgment that at the time plaintiff retired, he was required to accumulate a total of 30 years of active service, with satisfactory performance, to qualify for a retirement upgrade to the rank of major. This Court agrees with the defendant and with the September 23, 1981 ABCMR decision, which denied plaintiff a retirement upgrade to the higher rank of major, with accompanying back pay. Plaintiff's petition for summary judgment is, therefore, denied and defendant's cross motion for summary judgment is hereby granted.

Background

Plaintiff entered active military service in the Army on January 31, 1960, and progressed through regular rank advancements, attaining the grade of major in 1967. In 1974, and again in 1976, plaintiff was considered, but not selected for promotion to the rank of lieutenant colonel by Army selection boards. 2/ Following these two non-selections for promotion, the Army notified plaintiff that he would be released from active duty pursuant to 10 U.S.C. Section 3303 (1976). Due to his pending release, plaintiff applied for a noncommissioned warrant officer appointment in the Army Reserve. On August 5, 1976, after sixteen and one half years of active military service,

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2/ Plaintiff acknowledged at oral argument that the composition of the Army selection boards which considered his promotions is not an issue in this case.

plaintiff voluntarily resigned his regular commission of major and on the next day accepted a noncommissioned warrant officer appointment in the United States Army active reserve.

Four years later, on April 1, 1980, plaintiff voluntarily retired from active reserve duty in the grade of non-commissioned chief warrant officer two (CW2). At the time of retirement, due to his cumulative career in the regular and reserve Army, plaintiff had accrued twenty years and two months of active military service. 3/

In March 1981, plaintiff applied to the Army Board for the Correction of

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3/ Prior to his retirement, plaintiff had requested a determination from the Department of the Army of his eligibility for retirement in the rank of major. The Army authorities advised him then that he could not retire as a major until the sum of his active service and service on the retired list totalled at least thirty years.

Military Records (ABCMR) seeking a review of his military records and requesting that his retirement grade be advanced to that of a commissioned major, with retroactive back pay for retirement not received. On September 23, 1981, the ABCMR found that a retiring noncommissioned warrant officer, such as the plaintiff, would be entitled to retirement in a higher commissioned officer grade in which he had previously served only if his combined commissioned and noncommissioned years of service totaled 30 years. Therefore, the ABCMR found the plaintiff ineligible for a retirement upgrade, as requested.

Plaintiff filed his complaint in this Court on September 14, 1981, and subsequently a motion for summary judgment on September 11, 1985. He seeks a review of the ABCMR's decision, a correction of his military records and a change in his

retirement grade to reflect an upgrade of his retirement rank from noncommissioned chief warrant officer two (CW2) to the level of a commissioned major. He also requests an additional award to cover back, retirement pay, retroactive to April 1, 1980.

Discussion

The parties submit that this case presents an issue of statutory construction. Plaintiff relies on several statutes, including a number of which had been repealed at the operative time, to attempt to construct a theory to support the relief he seeks. 4/ However, as

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4/ Plaintiff relies on Section 202 of the Army and Air Force Vitalization and Equalization Act of 1948, c. 708, 62 Stat. 1081, 10 U.S.C. Section 971(b), repealed by 70A Stat. 641 (1956), reenacted and codified as 10 U.S.C. Section 1331, Act of August 10, 1956, c. 1041, 70A Stat. 1, 102; Sections 14(d) & (f) of the Warrant Officer Act of 1954, c. 249, 68 Stat. 157, repealed by 70A Stat. 641, reenacted and codified as 10 U.S.C. Section 1371 (1976); 10 U.S.C. Section 277 (1976), and the Fifth Amendment to the Constitution.

defendant contends, the controlling statute in effect in 1980, when plaintiff retired was 10 U.S.C. Section 3964 (1976), which provided the following:

> Each warrant officer of the Army, and each enlisted member of the Regular Army, who is retired before or after this title is enacted is entitled, when his active service plus his service on the retired list, for totals 30 years, to be advanced on the retired list to the highest temporary grade in which he served on active duty satisfactorily, as determined by the Secretary of the Army.
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> 10 U.S. C. Section 3964 (1976)

This statute clearly required an Army warrant officer who retired in 1980, although eligible to retire after 20 years, to have completed 30 years of total service in order to be advanced on the retired list, for retirement pay purposes, to the highest temporary grade in which he had served satisfactorily on active duty. This is to be distinguished from

commissioned officers who, at the time they are eligible to retire after 20 years, are entitled to be retired in the highest grade in which they served satisfactorily on active duty, in accordance with 10 U.S.C. Section 1370 (1980 Supp. IV). Until 1986, when chief warrant officers were granted commissioned status, 10 U.S.C. Section 3964 controlled the retirement pay rate of all Army warrant officers who retired. 5/

In the case before the Court, plaintiff voluntarily retired from the Army on April 1, 1980, after only 20 years

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5/ Section 531 of the Department of Defense Authorization Act of 1986, Pub. L. 99-145, 99 Stat. 633, finally gave Army chief warrant officers prospective official commissioned status. That statute is codified in 10 U.S.C. Section 555(b) (1986). Nevertheless, Section 555(b) was not in force at the time plaintiff retired and, therefore, when this cause of action arose in September of 1981. The 1986 statute was not made retroactive by its terms and, therefore, does not apply to plaintiff in this case.

of service. In accordance with the statutory requirements of 10 U.S.C. Section 3964, effective in 1980 at the time of plaintiff's retirement, he could only have been advanced on the retired list to the grade of major in April of 1990, at which time he would have met the 30 year requirement.

This Court finds the clear meaning of 10 U.S.C. Section 3964, as well as of the other relevant statutes and case law, to be unambiguous and dispositive. As a result, the Court does not find the need to resort to the legislative history to discern the statutory meaning. Plaintiff's anthology of obsolete statutes pertaining to military retirement does not preclude the application of the general rule for entitlement in military cases, that a "soldier's entitlement to pay [and retirement benefits] is dependent upon statutory rights." Bell v. United

States, 366 U.S. 393, 401 (1961). A. L. Abbott v. United States, 200 Ct. Cl. 384, 389, cert. denied, 414 U.S. 1024 (1973) reh'g denied, 414 U.S. 1138 (1974). Plaintiff's entitlement to be advanced to the highest grade in which he served is proscribed by 10 U.S.C. Section 3964. Plaintiff's analysis of the legislative history is neither persuasive nor even germane to the case now before the Court.

Plaintiff's argument primarily relies on the Warrant Officer Act of 1954, 249, 68 Stat. 157, 163, repealed by Act of August 10, 1956 (70A Stat. 641), which he now argues gives him the right to be retired with the highest retirement pay to which he may be entitled under any other law. Unfortunately for the plaintiff, this statute was repealed in 1956, many years before plaintiff's 1980 retirement.

Plaintiff's assertions that

uniformity between warrant officers of the respective services regarding retirement rights is mandated by the Army and Air Force Vitalization and Equalization Act of 1948, and by the Warrant Officer Act, supra, are also unpersuasive. Plaintiff contends that Section 202 of the Equalization Act, when read in conjunction with Sections 14(d) and 14(f) of the Warrant Officer Act, allows for his retirement from the Army in the "highest grade he has satisfactorily served" after only twenty years of active service. 7/

7/ Section 14 of the Warrant Officer Act provided in part that:

(d) A warrant officer who is retired under this section shall, as determined by the Secretary, be retired in the permanent warrant officer grade held on the day before the date of his retirement, or in any higher warrant officer grade in which he has satisfactorily served, as determined by the Secretary, on any full time duty under competent orders specifying that the period of such duty shall be for a period in excess of thirty days or for an indefinite period.

(f) The provisions of this section or section 13 shall not prevent any warrant officer from electing to be placed on the retired list in the highest and with the highest retired pay to which he may be entitled under any other law. 68 Stat. 163, 164 (1954).

Once again plaintiff relies on provisions of statutes that have been repealed. See Act of August 10, 1956, 1041, 70A Stat. 641, which repealed the provisions cited by plaintiff of both the Warrant Officer Act and the Equalization Act.

While in force, however, Section 202 of the Equalization Act provided that "any officer" on the active list or of the reserve components who had previously completed 20 years of service, 10 of which as a commissioned officer, could retire at the higher commissioned officer retirement rate. Section 202, however, did not, specify by reference, warrant officers, but rather used the term "officer" generically. Plaintiff argues that the reference to "officers" in Section 202 includes warrant officers which was changed and limited to commissioned officers during the 1956 codification of Section 202 in 10 U.S.C. Section

3911. 8/ Plaintiff points to Section 203(c) of the Equalization Act for additional support.

Plaintiff also argues that Section 203(c) of the Equalization Act provides for warrant officers to receive the same retirement opportunities as regular commissioned officers. Plaintiff's argument is based upon a chronology of legislative history which is inappropriate to this Court's analysis in interpreting a statute that is clear on its face. As was noted above, for this case, 10 U.S.C. Section 3964, which set out the years-of-service requirement for warrant officers who retired from the Army in

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8/ 10 U.S.C. Section 3911 (1976) provides the following: The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer.

1980, is the controlling statute. The Equalization Act, which previously provided for retirement of officers in more than one service, does not override later provisions enacted by Congress to provide solely for retirement of warrant officers in the Army (10 U.S.C. Sections 1370-1371, Supp. IV, 1980) and 10 U.S.C. Section 1364 (1976), or to change a classification distinction, as Congress did in Section 112 of the Defense Officer Personnel Management Act, Pub. L. 96-513, 94 Stat. 2876. 10 U.S.C. Section 1370, 1371).

The applicable 1980 statutory distinctions between warrant officers of the Army and Air Force and warrant officers of the Navy, Marines, and Coast Guard, pertaining to retirement from each of these services were Congressionally created and codified into different sections of the United States Code. In

the Army and Air Force, warrant officers in 1980 received their warrants from the Secretary of the Army, and were not commissioned by the President of the United States. Warrant officers of the other services received commissions from the President. 10 U.S.C. Section 555(b) (1976). The statutory package, defining the method of appointment, responsibilities and rights of an Army warrant officer is different from those pertaining to members of the other services.

In view of the codification of the Equalization Act and the Warrant Officer Act, there was no provision for retirement by Army personnel at a higher grade, without completing 30 years of service, or retirement at some other grade, without actually being at that grade on the date retirement occurs. Consequently, 10 U.S.C. Section 3964 specifically provides

the applicable rule for warrant officer retirement grade advancements in 1980, when plaintiff retired, and has been properly applied in this case.

Plaintiff argues that the Congressional distinction which provides for his retirement as a warrant officer (and not as a major) is "unfairly discriminatory" as compared to warrant officers of other services. Plaintiff relies upon 10 U.S.C. Section 277. 9/ Plaintiff suggests that 10 U.S.C. Section 277 mandates that a retiring Army warrant officer, who leaves after twenty years of service, ten of which were commissioned, should be retired as a retiring

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9/ Section 277 states: Laws applying to both Regulars and Reserves shall be administered without discrimination--

(1) among Regulars;
(2) among Reserves; and
(3) between Regulars and Reserves.

10 U.S.C. Section 277 (1976)

commissioned officer of like service time. He claims that to do otherwise discriminates between regular and reserve officers in violation of 10 U.S.C. Section 277. This argument, however, appears to be an attempt to deflect from the real issue in this case regarding the differing retirement rights of warrant officers and regular commissioned officers. 10 U.S.C. Section 277 only addresses distinctions between the rights of regular and reserve officers, which are not at issue in this case.

Lastly, plaintiff attempts to assert a constitutional challenge under the equal protection clause of the Fifth Amendment. Plaintiff tries to establish that the differeing rules governing retirement grade levels between Army warrant officers and warrant officers of other services with more favorable retirement rules is an

illegal classification, violative of the Fifth Amendment equal protection right.

Without taking a position on the issue of this Court's jurisdiction to decide whether a statutory retirement scheme, such as is at issue in this case, violates the Fifth Amendment of the Constitution, the Court would note that plaintiff's claim in this regard is also without merit. When a classification scheme does not impermissibly interfere with a fundamental right or operate to the peculiar disadvantage of a suspect class, such as race or religion, a Court need not undertake strict judicial scrutiny of that classification. When application of the strict scrutiny standard is inappropriate, as would be the case here, the legislative scheme is presumed to be valid and should be sustained if the classification as drawn by the statutes is rationally related to a legitimate governmental

interest. Massachusetts Board of Retirement v. Murgia, 427 U.S.307, 312, 314 (1976). 10/

The Court also notes that classification of persons for determining eligibility to receive benefits is not per se invalid and "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." Mathews v. Diaz, 426 U.S. 67, 83-84 (1976). How to draw such classification lines for the receipt of benefits, however, is a legislative not a judicial,

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10/ Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), involved an equal protection challenge under the Fourteenth Amendment. However, it is well settled that the "[e]qual Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976); and Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). Thus, the application of the rationality analysis is appropriate herein.

consideration. United States Railroad Retirement Board v. Fritz, 450 U.S. 160, 179 (1980).

In the past, the Supreme Court has held that a Congressionally enacted statute, requiring the registration for possible military service of men, but not women, did not violate the Fifth Amendment, Rostker v. Goldberg, 453 U.S. 57 (1981), and has held that statutory distinctions determining only certain reservists as eligible for a military retirement pay program was not violation of Fifth Amendment equal protection guarantees. Alexander v. Fioto, 430 U.S. 634 (1977). In Alexander, the court indicated that "[t]he statutory exclusion is unquestionably the product of a deliberate and rational choice which Congress had the constitutional power to make." Id. at 640. It is equally clear that the statutes which distinguished the

retirement pay rights of warrant officers of the various services in force at the time of plaintiff's retirement were not in violation of the equal protection clause of the Fifth Amendment and plaintiff can state no claim to retirement pay based on this argument.

Conclusion

Upon consideration of the oral arguments and written submissions offered by the parties, the plaintiff's motion for summary judgment is denied and the defendant's cross-motion for summary judgment is granted. The Court finds that in plaintiff's case, his retirement grade was properly set in accordance with 10 U.S.C. Section 3964 (1976). In 1980, when plaintiff retired, warrant officers seeking to upgrade their retirement grade were required to have satisfactorily

served on active duty for at least thirty years, a condition which plaintiff did not meet.

The Clerk is directed to enter judgment in accordance with the findings herein. The parties shall each bear their own costs.

IT IS SO ORDERED.

Marian Blank Horn

Judge

DEPARTMENT OF THE ARMY

BOARD FOR CORRECTION OF MILITARY RECORDS

THE PENTAGON, WASHINGTON, D.C.

IN THE CASE OF: MCCARRON, NEIL F. JR.

013-26-0079

COUNSEL:

DATE: 23 September 1981

DOCKET NUMBER: AC81-04708

INDEX NUMBER: 129.04, 136.00

MEMORANDUM OF CONSIDERATION

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the consideration.

Present:

Mr. Oliver Kennedy, Chairman

Mr. Robert C. Best, Member

Mr. James F. MacDonald, Member

Mr. John W. Matthews, Executive Secretary

Mr. Loren G. Harrell, Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairman on the above date. AR 15-185, the regulation governing the operation of the Board, provides that each application and the available military records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application.

The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. Following consideration of the case and having made its determination thereof, proceeded to other business.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records

Exhibit B - Military personnel records

Exhibit C -

Grant Request _____
Formal Hearing _____
Deny w/o Hearing _____

MCCARRON, NEIL F. JR., 013-26-0079

APPLICANT REQUESTS: That he be retired in the grade of major effective 1 April 1980; and that he be paid reasonable attorneys fees for representing himself and the class (sic).

APPLICANT STATES: That he was a recently retired warrant officer who previously served over 16 years as a commissioned officer, and was retired as a CW2, the grade he held at the time of his retirement; that he had asked the Army prior to retirement if he was entitled to retirement in his higher grade of major, but was told he did not qualify; that he believes that the Army was in error in their response to his inquiry, and that he was in fact entitled by law to retire in the grade in which he satisfactorily

served under the provisions of Section 202, P.L. 810, 80th Congress, as amended in 1956, the Warrant Officer Act of 1954, Title 10 USC Section 277, and the Fifth Amendment to the Constitution of the United States; that he was requesting that the Board correct his records to reflect his retirement in the highest grade in which he satisfactorily served, the grade of major, effective 1 April 1980 and that he be awarded reasonable attorneys fees for his representation on this issue, both for himself and for members of the class; that the petition was submitted in legal brief form and consisted of six legal issues, a statement of the case, and thereafter, separate discussion of each legal issue; that the separate discussion of the legal issues also refers to statutory material, legislative histories, and minutes of hearings.

MATERIAL EVIDENCE OF RECORD:

Incorporated in this memorandum and included by this reference are the military and medical records which reflect, in pertinent part:

The applicant, who had enlisted service, not on active duty, in the USNR from 9 Feb 55 through 16 Aug 59, was appointed a 2LT, ODC, USAR, on 17 Aug 59, upon graduation from SROTC University of Wichita. He entered on active duty on 31 Jan 60 and served until 5 Aug 76 when he was discharged from commission in the grade of MAJ with 16 years, 6 months and 5 days AFS due to his twice not being selected for promotion to the grade of LTC, USAR. He was appoined as a WO1 on 6 Aug 76. He was promoted to the grade of CW2 on 6 Oct 76 and was placed on the Retired List in such grade on 1 Apr 80 with 20 years and 2 months AFS.

On 12 Jul 79, the applicant in a letter to the Department requested a determination of eligibility for Retirement in the grade of MAJ, USAR, as he had served as a commissioned officer during his first 16 years of service and held the grade of MAJ for more than 8 years; that he obtained an appointment as a WO in 1976 in lieu of being separated from the Army after having been twice passed over for promotion from MAJ to LTC in 1975 and 1976; that the general rule pertaining to WO retirements was that WOs retire in the highest grade held unless entitled to a higher grade under some other provisions of law; that retirement in a higher grade, in cases where a higher grade had been held, was deferred until the WO achieved 30 years of service, active and retired; that the Warrant Officer Act of 1954, Section 14(d) also stated that a WO retires in the highest WO

grade; that, however, Section 14(f) contained provisions that allow a WO to elect to be retired in the highest grade and with the highest retired pay to which he would be entitled under any other law; that Public Law 88-130, 14 USC 334, contained provisions that allow a WO to retire in the highest commissioned grade held; that since one of the purposes of the Warrant Officer Act of 1954 was to establish uniform retirement benefits for WOs of all the services, and contained provisions for retirement in the highest grade and pay under any other law, he requested a determination be made to determine his eligibility for retirement in the highest grade in which he satisfactorily served under the combined provisions of AR 635-100, the Warrant Officer Act of 1954 and Public Law 88-130; that it should be noted that WOs of the Navy, Marine Corps and Coast Guard all

could be retired in a higher commissioned grade under the provisions of 10 USC 6323 and Public Law 88-130; that, also, other categories of Army personnel serving in a lower grade prior to retirement, but who previously held at least 10 years of satisfactory service in a higher commissioned grade, were retired in the higher grade under the provisions of AR 635-200 and AR 635-100; that it appeared the difference in treatment between Army WOs and WOs of the Navy, Marine Corps and Coast Guard was contrary to the intent of the Warrant Officer Act of 1954 to establish uniform retirement benefits for WOs of all services; and that the difference in treatment between different categories of Army personnel and WOs of other services appeared to deny the Army WOs who previously had satisfactorily served in a higher commissioned grade equal protection of the law.

On 24 Sep 79, the Department advised the applicant that during the Second Session of the 83d Congress, hearings were held by both the House Committee on Armed Services (HASC) and the Senate Committee on Armed Services (SASC) with respect to H.R. 6374, the "Warrant Officer Act of 1954"; that testimony by various representatives of the Defense Department manifested that his view of the Act's purpose as establishing uniform retirement benefits for WOs of all the services was not accurate; that the overall purpose of the Act was to provide permanent statutory career plans for WOs similar to that provided for commissioned officers; that further, the legislation was to accomplish as much uniformity "as was believed possible under current conditions of the WO programs of the services"; that one of the areas where it was recognized that uniformity was not desirable was the

matter of commissioned WOs in the Navy, Marine Corps and Coast Guard; that the Act allowed this lack of uniformity to remain in existence, and this resulted in the different language relating to retired grades for WOs in those services; that his argument that he must be treated the same as these warrants to fulfill the purpose of the Act was thus unfounded; that it was also pointed out during the hearings that the Act was designed to provide a "career program for the enlisted man . . . The primary purpose . . . was after a period of years a man develops a military specialty and was then advanced to the WO grade"; that thus he was in the WO program under circumstances different from those envisioned by the DOD framers of the Act; that in fact, he was receiving a substantial benefit by way of his WO status as it allowed him to become eligible for retirement regardless of his

promotion nonselections in a commissioned status which normally would have prevented him from achieving retirement based on 20 years'active service; that the judicial interpretation of equal protection of the laws was not one of total equality for all men, or for all soldiers, or even for all officers; that in its simplest terms, it was that all persons similarly situated should be treated the same under law; that courts acknowledge and allow the different treatment afforded different groups of military members, especially where their entry into the military and their personnel management were governed by different concepts; that he also stressed the language found in almost all statutes relating to retired grade- "Unless entitled to a higher retired grade under some other provision of law"; that this language did not mean that one was entitled to retire in any grade held at

any time in the service under any circumstances; that a specific provision of law must exist which would provide for retirement at a higher grade, usually because of a continuing status in another service component; that thus, a Regular Army WO who simultaneously held a Reserve commission coud qualify for retirement as a commissioned officr under the provisions of 10 USC 3911 if he had ten years' active duty as a commissioned officer before obtaining the Regular Army Warrant; that in addition, many statutes condition retired grade upon a Secretarial finding of satisfactory service in that grade; and that in his case, 10 USC 3964 would apply when his active service plus his service on the retired list totaled 30 years.

The applicant's legal brief and extracts of all statutes, laws and regulations are attached for the Board's review.

On 25 Jun 81, Chief, Retirement Branch, MILPERCEN, advised this Board that a review of the applicant's OMPF and related documents revealed that his highest active duty grade was MAJ, AUS; that he was twice nonselected for promotion to the temporary grade of LTC in 1975 and 1976; that Army Regulations required that such officers be released from active duty within 90 days of notification of the second nonselection; that rather than be seperated from the Army without the chance of earning retirement or returned to an enlisted status, the applicant requested an appointment as a Reserve WO; that in order to accept the appointment, he had to resign his Reserve commission, as no individual can hold dual status in any component; that he submitted his unqualified resignation from the Army on 6 Aug 76; that as a result of his voluntary

request, he was placed on the retired rolls of the Army effective 31 May 80, in the grade of CW2 with 20 years and 2 months AFS; that when his combined service and time on the retired lists equals 30 years, he will be advanced to the highest grade satisfactorily held on active duty; that his retirement processing in the grade of CW2 was proper and correct in accordance with 10 USC 1263/1371; and that in view of the foregoing, it was their opinion that the applicant's claim was without merit.

On 26 Aug 81, Acting Chief, Military Personnel Law Branch, Administrative Law Division, DAJA, advised this Board that it was the opinion of their office that a WO who retired pursuant to 10 USC 1293 for length of service, as did the applicant, will be retired as a WO in the grade authorized by 10 USC 1371; that their office was not aware of any other

provision of law which would allow the applicant to retire in a grade above that held at the time of his retirement; that the arguments in the applicant's brief were without legal merit; that accordingly, the applicant's retirement as a CW2 was proper under the applicable statues; and that finally, under 10 USC 3964, he could be advanced to the grade of MAJ when his total service (active duty and retired) equals thirty years.

DISCUSSION: In consideration of all the evidence, allegations, and information presented by the applicant in relation to the evidence of all the available records, staff advisory opinion(s) as rendered in the matter, and statutory and/or regulatory provisions pertaining thereto, it is concluded that:

1. The applicant, as a Reserve commissioned Army officer, who, after twice failed selection for promotion to

the grade of LTC, AUS, resigned his commission to accept an appointment as a Reserve Warrant Officer, is not entitled to be retired in the grade of major upon completion of 20 years service under the provisions of the Army and Air Force Vitalization and Retirement Act of 1948, as amended in 1956.

2. Contrary to the applicant's contention, the "Warrant Officer Act of 1954" allows for the lack of uniformity between services to remain in existence. The overall purpose of the Act was to provide a permanent statutory plan for warrant officers similar to that provided for commissioned officers. Additionally, the legislation was to accomplish as much uniformity "as was believed possible under current conditions of the warrant officer programs of the services." In this regard, one of the areas where it was recognized that uniformity was not

desirable was in the matter of the commissioned warrant officers in the Navy, Marine Corps and Coast Guard. The Act allowed this lack of uniformity to remain in existence, and this resulted in the different language relating to retired grades for warrant officers in those services. Accordingly, his assertion that he is to be treated the same as these warrants in accordance with the "1954 Act" is without merit.

3. As noted in the letter to the applicant from DCSPER, Congress in making rules and regulations for the Armed Forces has not always treated everyone the same. Further, the judicial interpretation of equal protection of the law is not one of total equality for all men, or for all soldiers, or even for all officers. Therefore, it would appear, that by the Department requiring the applicant to serve 30 years on the active and retired

list before advancing him to the grade of major, he is not being denied equal protection of the law.

4. There is no discrimination between and among regulars and reserves as provided for in Title 10 USC Section 277 in requiring officers such as the applicant to not be retired in the highest commissioned grade held for at least ten years or more.

5. Based on the language of the applicable laws and statutes, the Secretary of the Army is not abusing his discretionary powers in requiring the applicant to serve a total of 30 years on the active and retired list before advancing him to the highest grade in which he satisfactorily served.

6. In view of the foregoing, and the evidence of record, it would appear that the Secretary of the Army is supported by the law in claiming that the legislature

recognized and approved of different retirement provisions for warrant officers depending on whether the source of appointment was by a "commission" or by a "warrant".

7. In view of the foregoing, there does not appear to be a basis for the retirement of the applicant in the grade of major based on 20 or more years of active Federal service and 10 or more years of commissioned service. Further, his rights have not been violated in any respect in requiring him to serve until his active service and service on the retired list totals 30 years before advancing him to the grade of major. Accordingly, there is no basis on which to correct his records as requested.

DETERMINATION: The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice to warrant a formal hearing.

John W. Matthews

Executive Secretary

10 USC Section 277. Regular and reserve components: discrimination prohibited.

Laws applying to both Regulars and Reserves shall be administered without discrimination--

(1) among Regulars;

(2) among Reserves; and

(3) between Regulars and Reserves.

Aug. 10, 1956, c. 1041, 70A Stat. 14.

10 USC Section 1293. Twenty years or more: warrant officers

The Secretary concerned may, upon the warrant officer's request, retire a warrant officer of any armed force under his jurisdiction who has at least 20 years of active service that could be credited to him under section 511 of the Career Compensation Act of 1949, as amended (70 Stat. 114). (Aug. 10, 1956, c. 1041, 70A Stat. 101; Sept 7, 1962, Pub.L. 87-649, Section 6(1)(3), 76 Stat. 494.)

10 USC Section 1371. Warrant officers: general rule

Unless entitled to a higher retired grade under some other provision of law, a warrant officer retires, as determined by the Secretary concerned, in the permanent regular or reserve warrant officer grade, if any, that he held on the day before the date of his retirement, or in any higher

warrant officer grade in which he served on active duty satisfactorily, as determined by the Secretary, for a period of more than 30 days. (Aug. 10, 1956, c. 1041, 70A Stat. 104.)

10 USC Section 3911. Twenty years or more: regular or reserve commissioned officers

The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer. (Aug. 10, 1956, c. 1041, 70A Stat. 224.)

10 USC Section 3918. Thirty years or more: regular commissioned officers

A regular commissioned officer of the Army who has at least 30 years of service

computed under section 3926 of this title [10 USC Section 3926] may be retired upon his request, in the discretion of the President.

(Aug. 10, 1956, ch 1041, Section 1, 70A Stat. 226.)

HISTORY; ANICILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section: 3918

Source (U.S. Code) 10:943.

Source (Statutes at Large) R.S. 1243; Dec, 16, 1930, ch 14, Section 1 (as applicable to R.S. 1243), 46 Stat. 1028.

The word "commissioned" is inserted, since the retirement of warrant officers for length of service is covered by 10 USCS Section 1293. The word "regular" is inserted, since 10:943 is applicable historically only to officers of the Regular Army. The words "and placed on the retired list" are omitted as surplusage. The words "computed under

section 3926 of this title" are inserted for clarity.

10 USC Section 3926. Computation of years of service: voluntary retirement; regular and reserve commissioned officers

(a) For the purpose of determining whether an officer of the Army may be retired under section 3911, 3918, or 3924 of this title, his years of service are computed by adding--

(1) all active service performed as a member of the Army or the Air Force;

(2) all service in the Navy or Marine Corps that may be included in determining the eligibility of an officer of the Navy or Marine Corps for retirement;

(3) all service computed under section 3683 of this title; and

(4) if an officer of the Regular

Army, all active service performed as an officer of the Phillippine Constabulary.

(b) For the purpose of determining whether a commissioned officer of the Regular Army in the Medical Corps may be retired under section 3911, 3918, or 3924 of this title, his years of service are computed by adding to his service under subsection (a) all service performed as a contract surgeon, acting assistant surgeon, or contract physician, under a contract to serve full time and to take and change station as ordered.

(c) For the purpose of determining whether a commissioned officer of the Regular Army in the Dental Corps may be retired under section 3911, 3918, or 3924 of this title, his years of service are computed by adding to his service under subsection (a) all service as a contract dental surgeon or acting dental surgeon.

(Aug 10, 1956, c. 1041, 70A Stat. 228.)

10 USC Section 3963. Higher grade for service during certain periods: regular and reserve commissioned officers

(a) A regular commissioned officer who is retired, or a reserve commissioned officer who is retired or to whom retired pay is granted, is entitled to a retired grade equal to the highest temporary grade in the Army in which he served on active duty satisfactorily, as determined by the Secretary of the Army, for not less than six months.

(b) Upon retirement, a member of the Regular Army in the Army Nurse Corps or Army Medical Specialist Corps who was (1) a member of the Army Nurse Corps established by the Act of July 9, 1918, ch. 143 (40 Stat. 879), (2) a female dietitian or physical therapist appointed under the Act of December 22, 1942, ch.

805 (56 Stat. 1072), or (3) a female officer appointed under the Act of June 22, 1944, ch. 272 (58 Stat. 324), is entitled to a retired grade equal to the highest grade or relative rank in which she served on active duty satisfactorily, as determined by the Secretary, after September 8, 1940, and before July 1, 1946. (Aug. 10, 1956, c. 1041, 70A Stat. 230; Sept. 2, 1958, Pub.L. 85-861, Section 1(60), (100), 72 Stat. 1462, 1489.)

10 USC Section 3964. Higher grade after 30 years of service: Army warrant officers; regular enlisted members

Each warrant officer of the Army, and each enlisted member of the Regular Army, who is retired before or after this title is enacted is entitled, when his active service plus his service on the retired list totals 30 years, to be advanced on

the retired list to the highest temporary grade in which he served on active duty satisfactorily, as determined by the Secretary of the Army. (Aug. 10, 1956, c. 1041, 70A Stat. 231; Sept. 2, 1958, Pub.L. 85-861, Section 1(100), 72 Stat. 1489.)

10 USC Section 6323. Officers: 20 years

(a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

(b) For the purposes of this section--

(1) an officer's years of active service are computed by adding all his active service in the armed forces; and

(2) his years of service as a commissioned officer are computed by adding all his active service in the armed forces under permanent or temporary appointments in grades above warrant officer, W-1.

(c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired--

(1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy; or

(2) if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, in the next lower grade in which he has served, but not lower than his permanent grade.

(d) A warrant officer who retires under this section may elect to be placed

on the retired list in the highest grade and with the highest retired pay to which he is entitled under any provision of this title. If the pay of that highest grade is less than the pay of any warrant grade satisfactorily held by him on active duty, his retired pay shall be based on the higher pay.

(c) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2 1/2 percent of the basic pay to which he would be entitled if serving on active duty in the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based.

(f) Officers of the Naval Reserve and the Marine Corps Reserve who were

transferred to the Retired Reserve from an honorary retire list under section 213(b) of the Armed Forces Reserve Act of 1952 (66 Stat. 485), or are transferred to the Retired Reserve under section 6327 of this title, may be retired under this section, notwithstanding their retired status, if they are otherwise eligible. (Aug. 10, 1956, c. 1041, 70A Stat. 394; Sept. 2, 1958, Pub.L. 85-861, Section 1(142), 72 Stat. 1509.)

10 USC Section 6325. Officers: retired grade and pay

(a) Except as provided in subsection (b), each officer who is retired under section 6321 or 6322 of this title--

(1) unless otherwise entitled to a higher grade, shall be retired in the grade in which he was serving at the time of retirement; and

(2) unless otherwise entitled to

higher pay, is entitled to retired pay at the rate of 2 1/2 percent of the basic pay to which he would be entitled if serving on active duty in the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based.

(b) Each officer who is retired while serving in the grade of admiral, vice admiral, general, or lieutenant general by virtue of an appointment under section 5231 or 5232 of this title or who is retired while serving in a grade to which he was appointed under section 5597 of this title or promoted under section 5787 of this title--

(1) unless otherwise entitled to

a higher grade, shall be retired in the grade he would hold if he had not received such an appointment; and

(2) unless otherwise entitled to higher pay, is entitled to retired pay at the rate of 2 1/2 percent of the basic pay to which he would be entitled if serving on active duty in the grade he would hold if he had not received such an appointment multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based.

(c) A warrant officer who retires under section 6321, 6322, or 6323 of this title may elect to be placed on the retired list in the highest grade and with the highest pay to which he is entitled

under any provision of this title. If the pay of that highest grade is less than the pay of any warrant grade satisfactorily held by him on active duty, his retired pay shall be based on the higher pay. (Aug. 10, 1956, c. 1041, 70A Stat. 394; May 20, 1958, Pub.L. 85-422, Section (a)(b)(B), 71 Stat. 131, Sept. 2, 1958, Pub.L. 85-861, Section 1(143), 72 Stat. 1509.)

10 USC Section 555. Warrant officers: grades

(a) The regular warrant officer grades in each armed force corresponding to the pay grades prescribed for warrant officers by section 201(b) of title 37 [37 USCS Section 201(b)] are as follows: Warrant officer grade: [Unchanged]

(b) Permanent appointments of regular warrant officers, W-1, shall be made by warrant by the Secretary concerned.

Permanent appointments of regular chief warrant officers shall be made by commission by the President.
(As amended Nov. 8, 1985, P.L. 99-145, Title V, Part D, Section 531(a), Title XIII, Section 1303(a)(5), 99 Stat. 633, 739.)

10 USC Section 555. Warrant officers: grades

(a) The regular warrant officer grades in each armed force corresponding to the pay grades prescribed for warrant officers by section 201(c) of title 37 [37 USCS Section 201(c)] are as follows:

Warrant officer grade:
Chief warrant officer, W-4
Chief warrant officer, W-3
Chief warrant officer, W-2
Warrant officer, W-1

(b) Appointments of regular chief warrant officers of the Army and the Air

Force shall be made by warrant by the Secretary concerned. Permanent appointments of regular chief warrant officers of the Navy, Marine Corps, and Coast Guard shall be made by commission by the President, by and with the advice and consent of the Senate. Permanent appointments of regular warrant officers, W-1, shall be made by warrant by the Secretary concerned. (Aug. 10, 1956, ch 1041, Section 1, 70A Stat. 20; Sept. 7, 1962, P.L. 87-649, Sections 6(f)(2), 14(c)(2), 76 Stat. 494, 501; July 30, 1977, P.L. 95-79, Title III, Section 302(a)(4), 91 Stat. 326.

NAVY, MARINE CORPS, COAST GUARD--RETIREMENT OF PERSONNEL

CHAPTER 34--PUBLIC LAW 305

[S. 1405]

An Act to authorize the President to retire certain officers and enlisted men of the Navy, Marine Corps, and Coast Guard, and for other purposes.

Sec. 6. When any officer of the Regular Navy or the Regular Marine Corps or the Reserve Components thereof including any member of the Naval service, temporarily appointed to commissioned officer grade, whose permanent status is enlisted, has completed more than twenty years of active service in the Navy, Marine Corps, or Coast Guard, or the Reserve Components thereof, including active duty for training, at least ten years of which shall have been active commissioned service, he may at any time thereafter, upon his own application, in

the discretion of the President, be placed upon the retired list on the first day of such month as the President may designate.

ARMY AND AIR FORCE VITALIZATION AND RETIREMENT EQUALIZATION ACT OF 1948

Sec. 202. That portion of section 5 of the Act of July 31, 1935 (49 Stat. 507), as amended by section 3 of the Act of June 13, 1940 (54 Stat. 380; 10 U.S.C. 943a, 971b), ending with the colon following the first proviso thereof is hereby further amended to read as follows: "That any officer on the active list of the Regular Army, the Regular Air Force, or Phillippine Scouts or any officer of the reserve components of the Army of the United States or of the Air Force of the United States who shall have completed not less than twenty or more than thirty years' active Federal service in the armed forces of the United States, at least ten years of which shall have been active commissioned service, may in the discretion of the Secretary of the Army or the Secretary of the Air Force, as the

case may be, be retired upon his own application.

(c) That section 5 of the Act approved August 21, 1941 (55 Stat. 653), is hereby amended to read as follows:

"Sec. 5. Warrant officers shall be entitled to retirement under the same conditions as commissioned officers: Provided, That hereafter warrant officers may, in the discretion of the Secretary of the Army or the Secretary of the Air Force, whichever may be concerned, be retired after twenty years of active service: Provided further, That a warrant officer retired after twenty years of active service shall receive retired pay at the rate of 2 1/2 per centum of the annual active duty base and longevity pay at the time of retirement multiplied by the number of years of service credited for longevity pay purposes and not to

exceed 75 per centum of such annual, active duty base and longevity pay: Provided further, That a fractional year of six months or more shall be considered a full year in computing the number of years' service by which the rate of 2 1/2 per centum is multiplied: And provided further, That any warrant officer heretofore or hereafter retired under any provision of law shall upon the completion of thirty years' service, to include the sum of his active service and his service on the retired list, be advanced on the retired list to the highest temporary officer, flight officer, or warrant officer grade satisfactorily held by him while serving on active duty as determined by the cognizant Secretary during the period September 9, 1940, to June 30, 1946, and shall receive retired pay at the rate prescribed by law computed on the basis of the base and longevity pay which

he would receive if serving on active duty in such higher grade at the time of retirement: And provided further, That any warrant officer, heretofore or hereafter retired for disability incident to service, if entitled to advanced retired grade and increased retired pay under the provisions of this title, shall receive such advanced grade and increased pay effective upon the enactment of this title or upon his retirement, whichever is later."

(e) Each enlisted man of the Regular Army or the Regular Air Force heretofore or hereafter retired under any provision of law, shall upon the completion of thirty years of service, to include the sum of his active service and his service on the retired list, be advanced to the highest temporary commission, warrant, or enlisted grade satisfactorily held by him

while serviing on active duty, as determined by the cognizant Secretary, during the period September 9, 1940, to June 30, 1946, and shall receive retirement pay at the rate prescribed by law for his length of service at the time of retirement but based upon such higher temporary rank or grade: Provided, That any enlisted man heretofore or hereafter retired for disability incident to service, if entitled to advanced retired grade and increased retired pay under the provisions of this title, shall receive such advanced grade and increased pay effective upon the enactment of this Act or upon his retirement, whichever is later.

Sec. 205. (a) The Secretary of the Army and the Secretary of the Air Force may promulgate for their respective services such regulations as may be necessary to

carry into effect the provisions of this title.

(b) Nothing contained in this title shall be construed to deprive any person of any higher retired grade or rank, or any greater retired or retirement pay to which he or she may be entitled under any other provision of law. No back pay or allowances prior to the date of enactment of this title shall accrue to any person by reason of the enactment thereof.

WARRANT OFFICER ACT OF 1954

May 7 (legislative day, April 14), 1954.--
Ordered to be printed

Mr. Saltonstall, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H.R. 6374]

It should be noted that one basic difference between the warrant officer systems of the Navy, Marine Corps, and Coast Guard, on the one hand, and the Army and Air Force, on the other, would be continued in this bill. Under existing law the 3 former services have commissioned warrant officers while the latter 2 do not. The Army and Air Force consider that it would be an administrative handicap to change to commissions for the top three warrant officer grades and desire to continue

their present system of issuing warrants for all grades of warrant officers. On the other hand, it would adversely affect the morale of Navy, Marine Corps, and Coast Guard personnel to take away commissions already held by them. Since no inequities would result from continuation of this difference, the services would be permitted under the proposed legislation to continue their present systems in this respect.

(No. 68)

SUBCOMMITTEE HEARINGS ON H. R. 6374, TO REVISE CERTAIN LAWS TO WARRANT OFFICERS OF THE ARMY, NAVY, AIR FORCE, MARINE CORPS, AND COAST GUARD, AND FOR OTHER PURPOSES

House of Representatives,

Committee on Armed Services

Subcommittee No. 2

Washington, D.C., Wednesday

March 3, 1954.

Q. (MR. BLANCHARD) Now, this applies only to -- I will retract that. This applies to any warrant officer who is retired, but it only gives him the highest retired warrant officer pay. He will have to go to other provisions of law in order to qualify for commissioned officer's pay on the retired list. Now, does this in any way take away any benefit or privilege that a warrant

officer may have to be advanced under another provision of law to commissioned retired status?

A. (MR. RICHARDS) That follows.

A. (COL. HAMRICK) There is a savings provision later on in that respect.

Request for Admission No. 2(a)

Q. Do you admit or deny that warrant officers of the Navy, Marine Corps and Coast Guard who apply for retirement after completing more than 20 years of active service of which at least 10 years was service as a commissioned officer may be immediately retired in the highest commissioned officer grade in which they satisfactorily served?

A. Admit.

Request for Admission No. 28

Q. Do you admit or deny that section 202 of the Army and Air Force Vitalization and Retirement Act of 1948 (as amended) has been cited in Senate Report 2019, 84th Congress 2d session and used as the authority to advance a group of individuals previously retired as enlisted persons and Warrant officers, to the highest commissioned grade in which they

satisfactorily served, because they had served for over 20 years, 10 years of which were commissioned?

A. Admit.

Request for Admission No. 11

Q. Do you admit or deny that the Warrant Officer Act of 1954 prohibits any discrimination in the determination of retired grades for the warrant officers of the various services to be based on the form of their appointment as a Warrant officer?

A. Admit.

Request for Admission No. 21

Q. Do you admit or deny that the provisions of section 203(E) of the Army and Air Force Vitalization and Retirement Act of 1948, provides that Army enlisted men, retiring for length of service, will not be advanced to the highest

commissioned officer rank in which their service was satisfactory until their total service, (active and retired) equals thirty years?

A. Admit.

Request for Admission No. 23

Q. Do you admit or deny that the provisions of section 203(E) of the Army and Air Force Vitalization and Retirement Act of 1948, do not prevent an Army enlisted man from immediate retirement in a higher commissioned grade if he qualifies for retirement as a commissioned officer under the provisions of section 202 of the Army and Air Force Vitalization and Retirement Act of 1948, as amended?

A. Admit.